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[ORAL ARGUMENT NOT YET SCHEDULED]

Nos. 09-5333, 09-5339

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOHAMMED AL-ADAHI,
Petitioner-Appellee/Cross-Appellant,

v.

BARACK H. OBAMA, *et al.*,
Respondents-Appellants/Cross-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CROSS-APPELLEE AND REPLY BRIEF FOR APPELLANTS

TONY WEST
Assistant Attorney General

DOUGLAS N. LETTER
ROBERT M. LOEB
ANNE MURPHY
(202) 514-3688
*Attorneys, Appellate Staff
Civil Division, Room 7644
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001*

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GLOSSARY

AUMF. Authorization for Use of Military Force

DoD. Department of Defense

MCA. Military Commissions Act

SS. Schutzstaffel

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JURISDICTIONAL STATEMENT

Only one of the issues Al-Adahi has designated as "issues raised on cross-appeal" (A-ABr. at 37) is a genuine cross-appeal issue. "Cross-appeals are required only when the party prevailing below seeks to enlarge the scope of that judgment; they are not necessary when the party simply presents alternative bases for affirmance." *Crocker v. Piedmont Aviation, Inc.*, 49 F.3d 735, 741 (D.C. Cir. 1995). Al-Adahi's argument that he is entitled to a release order without qualifications seeks

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to enlarge the scope of his judgment. See A-ABr. at 50-55. But Al-Adahi's challenges to the district court's procedure, and in particular his attacks upon the court's decision to consider intelligence reports as evidence in the habeas proceeding (see *id.* at 37-49, 55-59), are not appropriate issues for cross-appeal. Nor does Al-Adahi raise these arguments as alternative grounds for affirming the district court's decision.

Nonetheless, the government has fully responded to these "cross-appeal" arguments below, and would have no objection if this Court were to consider them. This is one of the first habeas appeals to reach this Court. Over one hundred and seventy habeas proceedings are pending before the district courts of this Circuit. If this Court were to address the issues raised by Al-Adahi, it might provide useful guidance to the district courts and avoid numerous later appeals on those issues.

SUMMARY OF THE ARGUMENT

1. Nothing in Al-Adahi's brief can overcome the fact that the district court committed pervasive legal error in its approach to the evidence in Al-Adahi's habeas proceeding. The district court explicitly refused to consider the government's evidence as a whole, and its rulings on the evidence only confirm that the court looked at the evidence piece by piece, disregarded the larger context, and found the evidence wanting on a variety of legal grounds. Al-Adahi's brief cannot, by mere

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say-so, transform the district court's opinion into a different one that makes permissible findings of fact based upon a totality of the evidence.

Nor does Al-Adahi explain why the district court should not be taken to have done exactly what its opinion said it was doing. Among other things, the district court rejected the argument that it should consider the evidence as a whole; refused to consider Al-Adahi's extensive family and personal ties to al-Qaida as evidence that Al-Adahi himself might be part of al-Qaida; required the government to provide "affirmative" evidence of Al-Adahi's personal pro-al-Qaida beliefs; ruled out pieces of the government's evidence on the ground that they were deemed not to "compel" the finding that Al-Adahi was part of al-Qaida; faulted the government for failing to disprove the possibility that Al-Adahi and African al-Qaida trainees used body language to communicate special training plans; rejected the statements of one detainee as unreliable by citing to the emotional problems of an entirely different detainee; required the government to demonstrate with "hard" evidence that Al-Adahi was serving as an al-Qaida fighter at the time he was captured; and held that it need not consider the implausibility of Al-Adahi's own testimony because Al-Adahi did not need to prove anything. These rulings cannot be reconciled with a proper application of the preponderance of the evidence standard or the applicable detention standard, and Al-Adahi's brief is unable to explain them away.

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2. Al-Adahi's brief is also mistaken in describing this as a case where the district court rejected the government's evidence because it believed Al-Adahi's hearing testimony. The district court did not decide whether Al-Adahi's testimony was credible or not, because it reasoned that Al-Adahi did not have to prove anything. In any event, the record plainly shows that Al-Adahi was not a credible witness on his own behalf.

3. Al-Adahi argues that on remand this Court should exclude all intelligence reports as hearsay. The district court, however, properly rejected this attempt to bar all intelligence information. Al-Adahi was captured abroad under the laws of war, during a period of active military operations, and the evidence relevant to the legality of his detention consists almost exclusively of military intelligence. If his habeas proceeding is to be meaningful, the habeas court must be given the chance to consider it.

The Supreme Court has twice recently addressed the exceptional habeas proceedings for military detainees and in both cases – *Hamdi* and *Boumediene* – has anticipated that the habeas proceedings must be tailored to the exigencies of the military context. The district courts hearing the Guantanamo habeas cases, following *Hamdi* and *Boumediene*, have generally allowed the intelligence evidence to be admitted and then considered reliability on a document-by-document basis as part of

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the merits inquiry. That approach is correct, especially because key safeguards assure that the evidence before the habeas courts is reliable. Most importantly, the district court procedures give detainees' counsel complete access to the evidence used to justify detention and also to exculpatory evidence, and allow counsel an adequate opportunity to question all the evidence in court. In addition, intelligence evidence is produced under standards of its own for assuring that actionable intelligence is reliable. Many of those standards are part of the judiciary's inquiry into reliability as well.

4. This Court should also reject Al-Adahi's argument that the intelligence reports should have been excluded because they were allegedly collected in violation of the Third Geneva Convention. The provisions on which Al-Adahi primarily relies – Articles 17, 22 and 25 – do not apply to him. And Al-Adahi has not identified any violation of Common Article 3.

In any event, there is no basis in the Geneva Conventions for the evidentiary exclusionary rule Al-Adahi proposes, and Al-Adahi offers this Court no other legal ground for creating one. Nor are the Geneva Conventions judicially enforceable in actions brought by individuals in United States courts. The Conventions have never been enforceable in that manner, and Congress has in any event now enacted

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legislation – Section 5 of the Military Commissions Act – to explicitly bar their invocation as a source of privately enforceable rights in habeas proceedings.

5. Al-Adahi is mistaken in arguing that he had the right to have counsel present at all his interactions with the government after he obtained counsel, and to confront the witnesses against him. Both rights derive from constitutional protections for criminal defendants, and Al-Adahi cannot invoke them in this civil habeas proceeding.

6. Finally, the district court properly took account of relevant legislation and foreign policy concerns when it ordered the government to take the necessary diplomatic steps to effectuate Al-Adahi's release, and to report to Congress if necessary. Al-Adahi has not been released to date because the government has appealed and has sought a stay pending appeal. By contrast, every detainee under an unappealed court order of release (except for one Uighur), has been offered an appropriate country where he could relocate.

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~~SECRET/NOFORN~~**ARGUMENT****I. THE DISTRICT COURT IMPROPERLY HELD THE GOVERNMENT TO A HEIGHTENED STANDARD OF PROOF AND IMPERMISSIBLY NARROWED THE GOVERNMENT'S DETENTION AUTHORITY****A. The District Court's Opinion Demonstrates Both That The Court Did Not Consider The Totality Of The Evidence And That It Imposed A Heightened Standard Of Proof On The Government****1. The District Court's Overall Approach To The Evidence Was Legally Erroneous**

As our opening brief explained (at 42-43), the government's burden in the habeas proceedings is to submit evidence that "as a whole shows that the fact sought to be proved" – here, that petitioner is part of al-Qaida – "is more probable than not." *United States v. Montague*, 40 F.3d 1251, 1254-55 (D.C. Cir. 1994). The district court, however, did not even address whether the government's evidence, as a whole, established that Al-Adahi was detained lawfully under the AUMF. Instead, the court examined each piece of the government's evidence in isolation, without putting the evidence in its larger context. And the court gave legally erroneous reasons for finding the separate pieces of the government's evidence wanting.

Al-Adahi asks this Court to ignore all these aspects of the court's opinion. He argues generally that the district court must have applied the correct legal standards

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because the court summarized the legal standards properly in the opening section of its written decision. See, e.g., A-A Br. at 11, 12, 14.¹ The court's judgment, however, is based upon what the court actually did, rather than on boilerplate about what it said it was going to do. As we demonstrated in our opening brief, when the court went on to consider the evidence in the habeas proceeding, it imposed a far higher standard of proof upon the government than proof by a preponderance. See generally Br. 34-55.

Further, the district court's opinion flatly contradicts Al-Adahi's contention (at 6), that the court considered the totality of the evidence in reaching its conclusions. The court explicitly *rejected* the government's argument that the court should consider whether "'as a whole,' the evidence supporting [its] allegations comes together to support a conclusion that shows the Petitioner to be justifiably detained." J.A. 118. Instead, the court misapplied the "mosaic" theory, not to see whether the pieces of the mosaic formed a persuasive picture (compare A-ABr. at 12), but as a reason to test each piece of evidence separately. See J.A. 120 ("if the individual pieces of a mosaic are inherently flawed * * * then the mosaic will split apart"). This

¹ Al-Adahi also contends, however, that the parts of the district court's opinion that contradict his view of the case are just empty words on the page. See, e.g., A-ABr. at 20 ("the words 'compel' and 'compelling' [are] commonplace in legal writing").

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approach was mistaken, because as our opening brief explained (at 40), the “sum of an evidentiary presentation may well be greater than its constituent parts.” *Bourjaily v. United States*, 483 U.S. 171, 179-180 (1987). Moreover, the court erred in weighing each piece of evidence in isolation because: “[n]o one piece of evidence has to prove every element of the plaintiffs’ case; it need only make the existence of ‘any fact that is of consequence’ more or less probable.” *Adams v. Ameritech Services, Inc.*, 231 F.3d 414, 425 (7th Cir. 2000). See also *ibid.* (“A brick is not a wall.”).

Al-Adahi’s defense of the district court’s decision is itself legally flawed. For example, Al-Adahi contends that “the District Court’s *finding* that Appellants failed to satisfy their burden” of proof must be reviewed for clear error. A-ABr. at 6 (emphasis added); see also *id.* 9, 14, 25. Evidence sufficiency, however, is generally a legal question subject to de novo review. See, e.g., *Valdes v. United States*, 475 F.3d 1319, 1322 (D.C. Cir. 2007) (en banc). More specifically here, as the government’s brief explained (at 34-62), the court concluded that the government had failed to carry its burden of proof on the strength of a series of erroneous *legal* rulings that held the government to a heightened standard of proof. These errors are also subject to de novo review.

Al-Adahi’s brief is mistaken in contending (at 6, 13) that the district court’s legal rulings on the evidence are immune from review in this Court simply because

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the court issued them during a bench trial, rather than during pretrial proceedings on admissibility. When the trial court's evidentiary rulings during a merits proceeding are "dependent on, and integrally related to, a legal premise, * * * the appellate court has the authority and the duty to determine the proper legal premise and to correct the legal error" the trial judge has committed. *F.T.C. v. Texaco, Inc.*, 555 F.2d 862, 876 n.29 (D.C. Cir. 1977).

2. The District Court's Rulings on Specific Items of Evidence Were Legally Erroneous.

The district court's rulings on specific pieces of the evidence also confirm that the court failed to consider the totality of the evidence, and that its reasons for rejecting individual items were legally erroneous. The district court's opinion is almost devoid of findings of fact. Instead, the court approached the case by discussing the parties' views of the evidence and then, without resolving the factual disputes, holding on legal grounds that the government's evidence was insufficient to carry the government's burden of proof.²

² See, e.g., J.A. 123 (describing, but not resolving, factual question whether Riyadh was a bin Laden bodyguard); *id.* 124 (failing to decide whether Al-Adahi's travel from Yemen to Afghanistan was along a route commonly used by those traveling to join al-Qaida to fight); *id.* 125 (noting, but not resolving, conflict between Al-Adahi's testimony that "meeting with Bin Laden was common for visitors to Kandahar" and the government's view that Al-Adahi's personal access to bin Laden showed that senior al-Qaida leaders trusted Al-Adahi).

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a. Evidence of Al-Adahi's family and personal ties to al-Qaida.

When the district court evaluated the evidence of Al-Adahi's personal and family ties to al-Qaida, it erred in concluding that the evidence was an irrelevant distraction. J.A. 126. As our opening brief explained (at 44-45), the government's evidence showed that Al-Adahi was a "Yemeni al-Qaida member," [REDACTED], who retained his al-Qaida affiliation until his capture. Al-Adahi had developed such close ties to al-Qaida's inner circle that Usama bin Laden himself hosted the celebration for his sister⁶ [REDACTED] wedding. J.A. 564. After Al-Adahi left Al Farouq for purportedly flouting its no-smoking rules, he remained on good terms with al-Qaida and stayed in an al-Qaida compound. This evidence of Al-Adahi's personal and family ties to al-Qaida was obviously relevant to the question whether Al-Adahi can be deemed "part of" al-Qaida and could be detained under the AUMF. See *Hamlily v. Obama*, 616 F. Supp. 2d 63, 74 (D.D.C. 2009) ("[t]he laws of war traditionally emphasize pure associational status as the primary ground for detention; individual conduct provides only a secondary, alternative predicate").

The district court nonetheless ruled that this "sensational and compelling" evidence "does not constitute actual, reliable evidence" that the government could use to show that Al-Adahi was part of al-Qaida. J.A. 149. See also, *e.g.*, J.A. 126 (concluding that Al-Adahi's ties to al-Qaida should not "distract" the court in

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deciding the habeas case). That ruling was wrong, and nothing in Al-Adahi's brief shows otherwise.

Al-Adahi's brief also contends that the district court did, in fact, twice consider Al-Adahi's family and personal ties to al-Qaida. See A-ABr. at 15, 24 n.9. On both occasions, however, the court made an untenable distinction between Al-Adahi's family connections and his al-Qaida connections. Thus, the district court wrote that "even if Al-Adahi's expulsion [from Al Farouq] was handled with uncommon leniency because of [his brother-in-law] Riyadh's status, this fact demonstrates at most that Al-Adahi was being protected by a concerned family member * * *." J.A. 132. And it speculated that Al-Adahi could have come to know the bin Laden bodyguards socially during his lengthy stay with Riyadh. J.A. 143, 457. The court's distinction between family and al-Qaida connections in this context overlooks the facts that al-Qaida is simply an "umbrella organization for * * * militant groups," and that Riyadh lived in a walled compound that served as a guesthouse for mujahidin fighters. J.A. 393, 398. Where the family compound is also a place for terrorist operations, staying with the family is certainly probative that Al-Adahi was part of al-Qaida.

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~~SECRET/NOFORN~~**b. Evidence about Al-Adahi's Training at Al Farouq.**

As our opening brief explained (at 55-56), the district court erred when it discussed the significance of Al-Adahi's decision to go to al-Qaida's Al Farouq paramilitary training camp to "learn using weapons," J.A. 194-95. Al-Adahi's seeking out and obtaining additional training from al-Qaida at Al Farouq is highly probative of whether he was part of al-Qaida. Coupled with the strong evidence that Al-Adahi was recruited by al-Qaida, discussed Yemeni al-Qaida with Usama bin Laden, J.A. 553-554, and continued with the organization after his stay at Al Farouq, Al-Adahi's training shows that he was within, and subject to, the command structure of the organization.

Like the district court, however, Al-Adahi's brief discounts Al-Adahi's paramilitary training by interpreting the United States' detention authority under the AUMF – and under *Gherebi v. Obama*, 609 F. Supp.2d 43 (D.D.C. 2009) – too narrowly. See A-ABr. at 27-31.

Smoking and Fighting. The district court reasoned that Al-Adahi's alleged two-weeks of al-Qaida training at Al Farouq was insignificant because Al-Adahi broke camp rules. See J.A. 133. Al-Adahi's brief only repeats the district court's conclusion without rebutting the government's point that Al-Adahi did not stop being "part of" al-Qaida if during his training he violated camp rules by smoking. Al-

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Adahi's argument would be like saying (in the context of a different war) that the Allies could not have detained someone who sought and accepted weapons training at a Nazi training facility, trained for a brief period and was expelled from it for smoking, yet thereafter stayed at a compound with senior members of the SS and served as a personal bodyguard to Hitler.

Al-Adahi's brief (at 28-30) also perpetuates the district court's erroneous view that the government would have to show that at the time of Al-Adahi's capture, he was actually fighting for al-Qaida. See A-ABr. at 28. Rather, as *Gherebi* properly acknowledges, a person who gives orders for al-Qaida or is subject to al-Qaida's orders need not be engaged in battle; "an al-Qaeda member tasked with housing, feeding, or transporting al-Qaeda fighters could be detained as part of the enemy armed forces notwithstanding his lack of involvement in the actual fighting itself * * *." *Gherebi*, 609 F. Supp. 2d at 69. Similarly, a fighter waiting to be deployed or an al-Qaida trainee at Al Farouq would properly be subject to detention under the AUMF. Indeed, because al-Qaida is a militaristic organization, see J.A. 312-314, *all* individuals who are "part of" al-Qaida, *i.e.*, subject to al-Qaida command or direction, can be detained under the AUMF, regardless of their specific assignment at the time of detention.

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Establishing a break with al-Qaida. Al-Adahi's brief also objects (at 29 n.10) to the government's point that once an individual has joined al-Qaida – for example by supplementing earlier military training by attending an al-Qaida paramilitary training facility – but alleges during his habeas proceedings that he later broke with al-Qaida, then the burden must be on him to establish the break. As the government pointed out (at 58), once an individual has joined a criminal conspiracy, the law imposes a heavy burden upon him if he later alleges that he has withdrawn. See generally *U.S. v. Walls*, 70 F.3d 1323, 1327 (D.C. Cir. 1995) (defendant “remained loyal to the conspiracy and made no affirmative attempt to withdraw”); *U.S. v. Mardian*, 546 F.2d 973, 978 (D.C. Cir. 1976) (“terminating active participation” in the conspiracy “did not amount to withdrawal”).

Al-Adahi cannot explain why the same principle should not apply here. As we have explained, the reasons for requiring proof of withdrawal are even more compelling in this context, because being ““part of a structured collective whose very purpose it is to use armed force and inflict death and injury”” upon others, *Gherebi*, 609 F. Supp. 2d at 68, is even more dangerous than being part of a criminal conspiracy. But there was no evidence in this case of a break from al-Qaida. Rather, the evidence showed that Al-Adahi left Al Farouq for a mujahidin compound, was given the privilege of serving Usama bin Laden as a personal bodyguard, remained

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in Afghanistan during the armed conflict [REDACTED]
[REDACTED]
[REDACTED]

“Affirmative” and “direct” evidence. The district court also erred in reasoning that the government could establish Al-Adahi’s ongoing relationship with al-Qaida only through specific, “affirmative” evidence about Al-Adahi’s personal agreement with all the terrorist tenets of al-Qaida. See J.A. 132 (Al-Adahi’s lenient treatment after Al Farouq “most certainly is not affirmative evidence that Al-Adahi embraced al-Qaida, accepted its philosophy, and endorsed its terrorist activities”). The government had no obligation to prove Al-Adahi’s personal beliefs. If today, for example, U.S. troops capture men training at a camp for Taliban and al-Qaida recruits, our military detention authority would not require that the government determine the personal beliefs of each Taliban detainee. It is enough that the objective facts, such as paramilitary training on behalf of that group, show the person’s ties with the Taliban or al-Qaida. Similarly here, the government’s evidence – among other things, that Al-Adahi was related to members of al-Qaida’s inner circle, trained at Al Farouq, [REDACTED] [REDACTED] and himself was given the honor of serving as a personal bodyguard for bin Laden – was more than enough to show Al-Adahi’s integration into al-Qaida.

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The court compounded its error by demanding *direct* evidence of Al-Adahi's participation in battle. See J.A. 144, 146 and n.18.³ We note that while the government did not have to prove that Al-Adahi was a fighter, the government in fact presented strong circumstantial evidence on that point. See *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100 (2003) (explaining that circumstantial evidence may be "more certain, satisfying and persuasive than direct evidence."). The statements

[REDACTED]

— are solid circumstantial evidence that Al-Adahi was not, in fact, visiting Afghanistan's cities as a tourist in the last months of 2001. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

³ The district court also did not make a choice among "equally reasonable inferences," as Al-Adahi's brief suggests (at 25), when it faulted the government for failing to exclude far-fetched explanations of Al-Adahi's intimate knowledge of the routines of African trainees at Al Farouq. See J.A. 138 (hypothesizing that "[t]hough the Africans did not speak Arabic, [Al-Adahi] had access to them at 'the mosque, chow hall and sometimes at fitness training,' where non-verbal communication could have taken place"). Rather, the court disregarded the government's evidence on the unsound basis that the government had not excluded every possible explanation, besides superior connections, for Al-Adahi's "intimate knowledge of Al Farouq's operations and recruits * * *." J.A. 138.

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. Compare A-

ABr. at 8 (arguing that the government did not “identify a single item of evidence the District Court did not consider”).⁴

c. Bodyguard Evidence.

Al-Adahi’s brief also argues that in considering the government’s bodyguard evidence the “District Court evaluated the evidence and made reasonable inferences based on the totality of the evidence.” *Id.* 23. That is simply not what happened here.

[REDACTED] rebuts Al-Adahi’s view that the government asked the trial court to accept the substantial differences between Al-Adahi’s accounts of his purported motorcycle accident “as proof, *without any other evidence*, that he was injured in combat.” A-ABr. 26. Of course, there *was* other evidence, both that Al-Adahi moved from city to city instead of leaving Afghanistan, that Al-Adahi sustained injuries serious enough to require hospitalization, J.A. 421,

[REDACTED] The district court’s discussion of the motorcycle evidence was objectionable for the additional reason that the court expected the *government* to resolve the discrepancies in Al-Adahi’s story. J.A. 145.

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To show that Al-Adahi served as a bodyguard for Usama bin Laden, the government produced detailed statements by its witness, Bukhary, who saw Al-Adahi work as a bodyguard; evidence corroborating Bukhary's description of Al-Adahi driving a Toyota Corolla and wearing a Casio watch; and Al-Adahi's own statements showing that he knew other bodyguards well. The district court, however, concluded that Bukhary was unreliable, that the evidence about the watch and the car were not proper corroboration, and that Al-Adahi's familiarity with the bodyguards was not compelling evidence of his bodyguard service. None of these legal rulings can withstand scrutiny.

Bukhary's Statement. Al-Adahi criticizes the government for relying upon Bukhary's detailed accounts (see J.A. 406, 430-32) of how Al-Adahi secured the al Nibras guesthouse before Usama bin Laden's speech there. See A-ABr. at 17. His brief does not deny, however, that when district court concluded that Bukhary was not credible because of his "report of torture by Taliban, and emotional problems brought on by father," J.A. 140, the court in fact cited a document describing the emotional problems of an *entirely different detainee*. As the government's brief explained (at 48), it was legal error for the district court to discredit Bukhary's testimony on the basis of another man's alleged emotional difficulties.

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Although Al-Adahi responds that this Court should disregard this obvious mistake because credibility determinations generally warrant deference and because “other documents” cited by the district court “were sufficient to establish that Bukhary was not credible,” A-ABr. at 17, he cites no authority for the proposition that credibility determinations based on undeniable, blatant errors should be given deference. Nor does he explain how this Court can conclude that the district court would have reached the same conclusion without the error.

The corroborating evidence. Although Al-Adahi’s brief contends (at 18) that the district court “considered” the government’s corroborating evidence about the car and the watch and “concluded it was not sufficient,” the district court in fact gave legal reasons for disregarding the evidence that corroborated Bukhary’s statements that Al-Adahi and his own four bodyguards arrived in a white Toyota Corolla to perform security sweeps of the Al Nebra guesthouse, and that Al-Adahi was wearing a particular type of Casio watch. J.A. 430. See also *ibid.* (“All the leaders had four bodyguards and a similar Casio watch * * * this meant that [Al-Adahi] was a leader”) (Bukhary). The district court erroneously refused to consider the government’s corroborative evidence – that Al-Adahi had agreed that he drove a white Toyota Corolla, and that Al-Adahi was captured wearing a Casio watch – as evidence capable of corroborating Bukhary’s statement. See J.A. 141-42 (“The inference simply does

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not make sense – or in the words of a noted legal philosopher, ‘that dog won’t hunt’); J.A. 142 n.18 (“[n]eedless to say, white Corollas and Casio watches are hardly unique items, even in Afghanistan”).

Compelling evidence. Al-Adahi also tries to minimize the error the district court committed when it refused to consider [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] As our opening brief explained, it was legal error to require the government to produce compelling evidence of this or any other fact.

Al-Adahi’s brief responds that this Court “should reject the contention that the District Court’s use of the word ‘compel’ is somehow an application of a particular standard of proof.” A-ABr. 20. In Al-Adahi’s view, the district court meant only that “there were other inferences that were just as reasonable, if not more so, than the one offered by Appellants.” *Id.* 24.

This interpretation of the district court’s opinion, however, cannot be reconciled with what the court actually said and did. The court not only objected to the government’s evidence on the basis that it did not compel a particular conclusion,

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but it repeated that it was rejecting the evidence because “[i]t need not be the case that the *only* reason Al-Adahi could have come across this evidence was because he shared bodyguard duties with” the bin Laden bodyguards. J.A. 143. The district court thus twice expressly stated that it would not accept Al-Adahi’s personal knowledge about Usama bin Laden’s security detail as evidence of Al-Adahi’s bodyguard service because the government had failed to exclude all other possible explanations. That approach is simply not consistent with the preponderance of the evidence standard.

In the end, Al-Adahi tries to set these numerous errors aside by arguing that the government’s “bodyguard claim is particularly fanciful” because it would have required Al-Adahi to have risen to “a position of such trust within weeks after having met bin Laden” and after being expelled from Al Farouq. A-ABr. 20 n.6. Far from being “fanciful,” however, it is entirely plausible that Al-Adahi, having begun his al-Qaida career and obtained military training in Yemen (see J.A. 595), was already a trusted part of al-Qaida when his sister^{1, 6} married a bin Laden bodyguard. The al-Qaida inner circle’s trust in Al-Adahi was manifested not only by the kinship bond of a marriage celebrated at Usama bin Laden’s compound, but also by a conversation between bin Laden and Al-Adahi about the jihadi effort in Yemen. See J.A. 553-554 (bin Laden asked Al-Adahi “about tribal leaders * * * many of whom were in charge

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of jihad”). As Bukhary told U.S. officials, Al-Adahi was viewed as a well-connected person who himself received homage from lower level al-Qaida supporters. See J.A. 430. Thus, it is hardly surprising that Al-Adahi was given the honor of directly serving Usama bin Laden. Indeed, given Al-Adahi’s admitted familiarity with the other personal bodyguards and the evidence from Bukhary about Al-Adahi’s own service as a bodyguard, Al-Adahi’s attempt to treat this assertion as “fanciful” is just wishful thinking.

B. The District Court Mistakenly Held That It Need Not Scrutinize Al-Adahi’s Story, And It Overlooked Evidence That Al-Adahi Was Not Credible Witness For Himself

As our brief explained (at 50-51), the district court erred in failing to test Al-Adahi’s testimony against the weight of the evidence because it reasoned that Al-Adahi was under no obligation to prove anything. See J.A. 121 (“Just as a criminal defendant need not prove his innocence, a detainee need not prove that he was acting innocently.”). In the district court’s view, any holes or inconsistencies in Al-Adahi’s version of events should not be held against him because “the fact that the petitioner may not be able to offer neat answers to every factual question posed by the Government does not relieve the Government of its obligation to satisfy its burden of proof.” J.A. 121. Under the preponderance of the evidence standard, however, the

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court should have considered Al-Adahi's testimony carefully in determining which party's version of the relevant facts to credit.

The district court's view that the plausibility of Al-Adahi's story was unimportant contradicts Al-Adahi's argument that the court must have relied extensively upon "the demeanor and credibility of [Al-Adahi], the only witness who appeared to provide direct evidence." A-A Br. at 7. See also *id.* 21 ("each and every credibility determination by the District Court was necessarily affected by the live testimony" from Al-Adahi).

It is unmistakably clear from the record that this was not a case in which the district judge heard the testimony of the live witness and ruled in his favor because the judge found the witness credible and believed his story. The district court made no finding that Al-Adahi was a credible witness, either overall, or with respect to any specific issue. Rather, as we have shown, the court dealt with the evidence not by resolving the disputed questions of fact, but by ruling out the government's pieces of evidence, individually, for mistaken legal reasons. In any event, a finding that Al-Adahi was a wholly credible witness would have been clearly erroneous. See *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 575 (1985).

Al-Adahi himself admitted during his testimony in the habeas proceeding that he was willing to be candid only to the extent that he believed that telling the truth

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would not hurt him. Al-Adahi expressed his regret at having volunteered information about meeting Usama bin Laden, saying “[i]f it was dangerous for me, I would not have [given] you this information.” J.A. 224.

The record confirms that Al-Adahi lied about certain things until he was found out. For example, Al-Adahi at first denied that he knew another Guantanamo detainee, Abdu Muhamad Al-Muhajiri. See J.A. 371.⁵ Al-Muhajiri, however, was Al-Adahi’s own brother-in-law, the husband of his sister^{1, 6} ⁶ Moreover, Al-Adahi personally knew this brother-in-law, the man who had helped Al-Adahi’s other brother-in-law, Riyadh (husband of^{1, 6} , run the compound where Al-Adahi had stayed before and after his training period at Al Farouq.⁷ Once Al-Adahi discovered that the government already knew that he was related to Al-Muhajiri, however, see J.A. 372, Al-Adahi admitted to the relationship and also admitted that he had previously kept the relationship hidden. See J.A. 374 (Al-Adahi).

⁵ Al-Muhajiri is also referred to in the documents as Abdu al-Muthana, or by the number ISN 728.

⁶ See J.A. 371; see also J.A. 470 (statement of Al-Adahi that his brother-in-law Al-Muhajiri had helped to arrange his travel to Afghanistan); J.A. 594 (statement of^{1, 6} referring to her husband by his alias “Abu Hamas”)

⁷ See, e.g., J.A. 398 (Al-Adahi) (referring to Al-Muhajiri as 728); J.A. 393 (Al-Adahi) (both Al-Adahi’s brothers-in-law stayed at the compound); J.A. 573 (Al-Adahi) (Al-Adahi stayed in a “house/compound” belonging to both brothers-in-law).

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Al-Adahi also changed his story about his reasons for traveling from Yemen to Afghanistan in 2001, from taking his sister ^{1.6} [REDACTED] to her husband in Afghanistan for medical treatments for back pain, (see J.A. 329 (Al-Adahi); J.A. 334 (Al-Adahi); J.A. 417 (Al-Adahi)); to a celebration of his sister's wedding to her new husband, Riyadh (see, *e.g.*, J.A. 563 (Al-Adahi); J.A. 209 (Al-Adahi's testimony)). Once Al-Adahi had disclosed the circumstances surrounding the wedding, he never again mentioned his sister's alleged medical complaints. Al-Adahi's abandonment of his original explanation of his visit to Afghanistan strongly suggests that "back pain" was a cover story whose usefulness ended once the circumstances of the wedding – circumstances that establish Al-Adahi's personal access to the most senior levels of al-Qaida – had come to light.

The implausibility of al-Adahi's testimony is also relevant because his shifting explanations are consistent with someone trained in counter-intelligence techniques. See J.A. 308-309. For a person who has joined al-Qaida, "[c]onfronting the interrogator and defeating him is part of your jihad," *id.* 309, to the extent that it "is better to die a martyr than provide information to the interrogator." *Ibid.* Al-Qaida manuals for resisting interrogation thus teach how to develop a cover story, to refuse to answer questions, to recant statements already made, to claim torture and to answer questions as vaguely as possible. See *id.* 309.

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The district court was accordingly mistaken in concluding that in drawing distinctions between parts of Al-Adahi's testimony the government tried to "have it both ways, *i.e.*, when [Al-Adahi] says something that supports the government's position he should be believed, but when he says something that contradicts the government's position he is a liar." J.A. 137. The court thus mistakenly disparaged the government's view that Al-Adahi's vague and implausible innocent explanations for his activities – for example, that a father of two would begin paramilitary training at an al-Qaida camp out of curiosity, J.A. 388, or would respond to the al-Qaida attacks of September 11 by taking an extended tourist vacation among Afghanistan's cities, J.A. 327 – were less likely to be true than the detailed and extensive accounts Al-Adahi gave of al-Qaida logistics, compounds, and of the Al Farouq camp. See *e.g.*, J.A. 387-389, 398-399.

The government was also entitled to infer that Al-Adahi was more likely to be telling the truth when his statements would tend to confirm his involvement with al-Qaida than when he offered alternative explanations for his actions. The law assumes "that persons do not make statements which are damaging to themselves unless satisfied for good reason that they are true." Advisory Committee Notes to Fed. R. Evid. 804(b)(3) (note to the rule authorizing the admission of statements against interest).

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II. THE DISTRICT COURT DID NOT ERR IN CONSIDERING INTELLIGENCE REPORTS IN AL-ADAHIS HABEAS PROCEEDING

A. In Seeking To Bar The Use Of Intelligence Information, Al-Adahi Overlooks The Unique Legal And Factual Context Of Habeas Proceedings For Military Detainees

The district court properly rejected Al-Adahi's request for the blanket exclusion, as hearsay, of all the military intelligence evidence. On appeal, Al-Adahi likewise asks this Court to bar the district court on any remand from considering intelligence reports. Al-Adahi's request ignores both the military context of his habeas proceeding and the Supreme Court decisions that have addressed how that context must shape these proceedings. This Court should reject it.

1. Al-Adahi asks this Court to treat this case as any other, and to impose standards that would ordinarily apply in a domestic criminal case. See, *e.g.*, A-ABr. at 45 (citing criminal cases construing the Rules). *Hamdi* and *Boumediene*, however, in no way contemplate habeas proceedings for military detainees that resemble criminal-type trials, subject to all of the evidentiary rules. See *Boumediene v. Bush*, 128 S. Ct. 2229, 2269 (2008) (“[h]abeas corpus proceedings need not resemble a criminal trial, even when the detention is by executive order.”). Rather, both cases recognize the uniqueness of this setting and anticipate that the habeas rules and remedies will be tailored to the specific needs of courts litigating novel questions of

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military detention. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 535 (2004) (the “full protections that accompany challenges to detentions in other settings may prove unworkable and inappropriate” in habeas proceedings for military detainees) (plurality op.).

The “law of war and the realities of combat may render military detentions both necessary and appropriate, and * * * our Constitution recognizes that core strategic matters of warmaking belong in the hands of those who are best positioned and most politically accountable for making them.” *Hamdi*, 542 U.S. at 531 (plurality op.). As the government’s opening brief explained (Br. 38-39, 46), in this context the courts must be allowed to consider the types of evidence the military uses when it makes military detention decisions. In proceedings challenging the military’s detention of individuals captured abroad during an armed conflict, evidence generated by the military (and by other agencies operating abroad) will generally be not only the most relevant and probative evidence, but often the *only* evidence bearing on the legality of the detention. The courts must at least be able to consider it.

Indeed, the *Hamdi* plurality strongly suggests that intelligence reports should as a general rule be admissible in the military detainees’ habeas proceedings. The Supreme Court in *Hamdi* explicitly recognized that the government could support detention with “documentation regarding battlefield detainees already * * * kept in

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the ordinary course of military affairs,” *Hamdi*, 542 U.S. at 534, such as the intelligence reports that form the very basis of this and the other habeas cases being litigated in district court. *See id.* at 538 (“a habeas court in a case such as this may accept affidavit evidence like that contained in the³ [REDACTED] Declaration”)⁸; *id.* at 534 (court may allow “a knowledgeable affiant to summarize [documentation regarding detainees] * * * to an independent tribunal”); *ibid.* (“Hearsay * * * may need to be accepted as the most reliable evidence from the Government.”)⁹.

Boumediene likewise clearly foresaw that meaningful consideration would have to be given to the “procedural and substantive standards” developed for the habeas proceedings for military detainees. *Boumediene*, 128 S. Ct. at 2276. *Boumediene* recognized that while these habeas proceedings arise in a unique military setting, the federal courts are not helpless to accommodate them. Habeas proceedings are flexible; “common-law habeas corpus was, above all, an adaptable remedy” whose “precise application and scope changed depending upon the circumstances.” *Boumediene*, 128 S.Ct. at 2267. *Boumediene* thus explicitly recognized that

⁸ In the³ [REDACTED] Declaration, a senior military official summarized the military’s evidence against Hamdi, including military reports and interviews with Hamdi. *See Hamdi*, 542 U.S. at 512-513.

⁹ Here, the government has provided much more than the summary approved in *Hamdi*; it has given Al-Adahi’s counsel the intelligence reports themselves.

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“accommodations can be made” in this exceptional context “to reduce the burden habeas corpus proceedings will place on the military without impermissibly diluting the protections of the writ.” *Boumediene*, 128 S. Ct. at 2276. It then cautioned that in developing these “procedural and substantive standards,” the courts should accord “proper deference * * * to the political branches.” *Boumediene*, 128 S. Ct. at 2276. See also *id.*, 128 S. Ct. at 2277 (the law “must accord the Executive substantial authority to apprehend and detain those who pose a real danger to our security”).

The substantive goal of *Boumediene* and *Hamdi* – court review of the factual basis for detention – also would be thwarted by a rule barring all intelligence reports. Under *Hamdi*, the detainee “must receive notice of the *factual basis* for his classification” and a “fair opportunity to rebut the Government’s factual assertions * * *.” *Hamdi*, 542 U.S. at 533 (emphasis added). If intelligence reports are the basis for detention, those reports must be evaluated “before a neutral decisionmaker.” *Ibid.* See also *Boumediene*, 128 S. Ct. at 2270 (courts must have “some authority to assess the sufficiency of the Government’s evidence against the detainee”). Likewise, the Rules of Evidence would limit the presentation of both the government’s evidence as well as petitioner’s evidence, but *Boumediene* requires the habeas court to “*admit and consider* relevant exculpatory evidence.” 128 S. Ct. at 2270 (emphasis added).

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2. Adhering to *Hamdi* and *Boumediene*, the district courts of this Circuit have developed a set of procedural rules exclusively for use in the habeas proceedings for military detainees. For the most part, the judges admit and consider the intelligence evidence, and they assess its reliability as part of the inquiry into the merits. See, e.g., *Al Odah v. United States*, __ F. Supp. 2d ___, 2009WL 2730489, *2 (D.D.C. 2009) (“This court is fully capable of considering whether a piece of evidence (whether hearsay or not) is reliable, and it shall make such determinations in the context of the evidence and arguments presented during the Merits Hearing”). At least one judge has substantially diverged from this approach – Judge Walton – by instead largely requiring strict compliance with the Federal Rules of Evidence, a ruling that in the government’s view is erroneous. See *Al Bihani v. Obama*, 2009 WL 3049054, (D.D.C. Sept. 8 2009); *Bostan v. Obama*, 2009 WL 3785753, (D.D.C. Oct. 23, 2009).

The approach that allows the evidence to be admitted is correct and this Court should adopt it. First, although the evidence rules generally apply to run-of-the-mine habeas proceedings under 28 U.S.C. § 2241, see Fed. R. Evid. 1101(e), they govern such proceedings only to the extent that “matters of evidence are not provided for in the statutes which govern procedure therein or in other rules,” *ibid*. See also *Boumediene*, 128 S. Ct. at 2276 (acknowledging that “accommodations can be made” for the unique circumstances of the proceedings for military detainees). By requiring

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the district courts to “summarily hear and determine the facts, and dispose of the matter as law and justice require,” 28 U.S.C. § 2243, the habeas statute envisions flexible equitable proceedings – proceedings that in this context require recognition of the types of material available in the context of military detention during an armed conflict. In other contexts, the Supreme Court has emphasized that the habeas statutes must be read against a background understanding that “habeas corpus is, at its core, an equitable remedy,” *Schlup v. Delo*, 513 U.S. 298, 319 (1995), and it has “relied on the equitable nature of habeas corpus to preclude application of strict rules of res judicata” although the language of the habeas statute at issue, 28 U.S.C. § 2255, did not provide for such an inquiry. *Ibid.* Thus, when required by the particular context, as well as “law and justice,” 28 U.S.C. § 2243, habeas courts do, in fact, consider evidence that would be inadmissible under the hearsay rules. See, e.g., *House v. Bell*, 547 U.S. 518, 538 (2006) (when petitioner’s claim for relief is based on allegations of “actual innocence,” the “habeas court must consider ‘all the evidence,’ old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under ‘rules of admissibility that would govern at trial’”) (quoting *Schlup*, 513 U.S. at 327-28). See also *Boumediene*, 128 S. Ct. at 2267-68 (where exculpatory information is in question, the statements of “unimpeached witnesses” should not be ignored or removed from consideration;

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rather, their presence in the record should prompt the court to also allow petitioner the opportunity to “provide[] new evidence to exculpate the prisoner,” *id.* 2268). Compare A-ABr. at 49. In this wartime military detention context especially, these adaptable habeas provisions compel the consideration of relevant, probative evidence. See *Boumediene*, 128 S. Ct. at 2276.

It also remains the view of the United States that the Federal Rules of Evidence do not apply because these are constitutional, and not statutory habeas cases. As Justice Souter stated in his concurrence in *Boumediene*, 128 S. Ct. at 2278, what now remains after the Supreme Court’s ruling “must be constitutionally based jurisdiction or none at all.” Thus, this is not in our view a proceeding under § 2241, addressed in Fed. R. Evid. 1101(e). In a footnote in *Kiyemba v. Obama*, 561 F.3d 509, 512-513 n.2 (D.C. Cir. 2009), *cert. pet. filed* (No. 09-581), this Court ruled that § 2241 was restored by *Boumediene*. In so ruling, however, the Court was addressing the relief available, and not the nature of the proceedings or the rules of evidence. As we have explained, the Supreme Court recognized that the courts going forward must maintain flexibility to accommodate the unique context presented by these war time military detention cases. The Court embraced the use of hearsay in *Hamdi* as a necessary aspect of the military detention cases, and that ruling remains correct today. As we now explain, any reading of the jurisdiction and evidence rules that would bar

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intelligence reports as hearsay would frustrate the ability of the government to respond promptly and fully to the habeas claims, would be incompatible with *Hamdi* and *Boumediene*, and should be rejected.

ii. Although their procedures are not uniform, the district courts are moving ahead with habeas proceedings for the Guantanamo detainees that safeguard against the improper use of hearsay evidence by allowing the detainees' counsel unfettered access to the evidence and a full opportunity to contest the reliability of particular pieces of evidence. See *Beech Aircraft v. Rainey*, 488 U.S. 153, 168 (1988) (admitting evidence "subject to the ultimate safeguard -- the opponent's right to present evidence tending to contradict or diminish [its] weight").

In these habeas proceedings testing the military's decisions to detain individuals captured during an armed conflict abroad, the district courts have generally allowed intelligence reports and expert declarations to be admitted. Significantly, the context for the admission of the intelligence reports provides substantial opportunities for the detainee to challenge the government's assertions and to question the evidence. See generally J.A. 164-174 (Case Management Order for this proceeding). In this case, for example, the government filed a factual return and complied with a broad obligation to disclose not only exculpatory material discovered in the process of preparing the factual return for Al-Adahi, but also

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evidence “contained in any information reviewed by attorneys preparing factual returns for all detainees” and in “any other evidence the Government discovers while litigating habeas corpus petitions filed by detainees at Guantanamo Bay.” J.A. 167. Al-Adahi was granted automatic discovery of all the documents and statements the government relied upon to support detention, and all information surrounding the circumstances under which any statements were given. *Id.* 168. Compare *Harris v. Nelson*, 394 U.S. 286, 293 (1969) (discovery rules do not apply in habeas proceedings, in part because discovery was not traditionally part of habeas practice). Al-Adahi moved for, and was granted, additional discovery on specific topics. See J.A. 169; J.A. 154-163 (discovery orders). His counsel were granted security clearances and given access to the classified evidence. See J.A. 170. Al-Adahi responded to the government’s factual return with a traverse. See J.A. 112.

ii. In this setting, the district court properly rejected Al-Adahi’s request to exclude all intelligence reports as hearsay under a blanket rule. As a practical matter, these intelligence materials, collected abroad during a military conflict, were the most relevant and probative evidence to show that a person like Al-Adahi – a Yemeni citizen taken into custody in [REDACTED] at a time of zone of active hostilities, see J.A. 147 – is properly detained under the laws of war. In this conflict, DoD has no choice but to rely extensively on military and other intelligence sources in determining who

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should remain in detention. See J.A. 258 (intelligence information “is critical in the fight against a highly compartmentalized, savvy and network-based enemy”). Al-Qaida, the Taliban and the associated belligerent forces are not a regular military force, easily identifiable by their uniforms or other insignia, but a group of associated paramilitary terrorist organizations. These secretive organizations train their recruits to disguise their terrorist affiliations and to evade detection. See J.A. 309. Information about al-Qaida, the Taliban and associated forces accordingly comes primarily from military and non-military intelligence sources working abroad.

The district courts’ decision to consider the intelligence reports is proper not only because the reports are necessary to a just resolution of the questions before the court and because that decision is consistent with *Hamdi* and *Boumediene*, but also because, as we demonstrate below, these reports have their own specialized indicia of reliability that the habeas courts can evaluate. The reports can be tested under the same basic criteria judges ordinarily use to assess whether evidence is trustworthy.

Unlike individual pieces of hearsay evidence that might be relevant in an ordinary civil or criminal case, intelligence reports are part of a body of documents produced under ascertainable standards designed to ensure that they are reliable. The government’s primary focus in the theater of operations is on collecting actionable intelligence rather than admissible evidence. Nonetheless, the purpose of the military

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undertaking is to “provid[e] accurate information[.]” Army Field Manual 2-22.3, 8-3. Military intelligence collectors are trained to draw information from intelligence sources using standard methods designed for the types of situations that confront the military. See Army Field Manual 2-22.3 at 1-8. These collection methods have been developed to produce the most accurate intelligence information available under the circumstances, for use by the military and the broader intelligence community in taking action to protect the interests of the United States. *Id.* at 1-4.¹⁰ See generally J.A. 228-258 (background expert declaration on intelligence methods and collection).

Military intelligence reports generally include a “source field” that provides a contemporaneous assessment of the reliability of both the witness and the information provided. See Army Field Manual 2-22.3, Apx. B; J.A. 302-306 (explaining how to interpret the reliability assessments in DoD intelligence reports).¹¹ The district court in the habeas proceeding thus has before it the reliability assessment the intelligence collector made for purposes of the intelligence report. In the habeas proceeding, however, the intelligence evidence is gathered and placed in context with other

¹⁰ The Army Field Manual is available online at:
<http://www.army.mil/institution/armypublicaffairs/pdf/fm2-22-3.pdf>.

¹¹ In the rare event that a source is particularly sensitive, this information may have been redacted in the habeas proceedings. Almost all the intelligence documents in Al-Adahi’s proceeding, however, include source reliability information.

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evidence and the court will use it to determine historical fact, rather than as actionable intelligence. In this context, the court must also assess reliability for itself.¹²

For the purpose of establishing reliability under judicial standards, military intelligence reports have indicia of reliability analogous to those recognized in the Federal Rules of Evidence through the hearsay exception for public records. See Fed. R. Evid. 803(8); compare A-ABr. at 43-44 (arguing that military intelligence reports would not comply with the technical requirements for admission as public records). Records created and maintained by government officials are admissible in ordinary civil litigation on “the assumption that a public official will perform his duty properly and the unlikelihood that he will remember the details independently of the record.” Advisory Committee Notes to 1972 Proposed Rules. The two reliability indicators recognized by this assumption – accurate and contemporaneous reporting – are also emphasized in the procedures for generating intelligence reports.

Intelligence reports are collected under mandatory reporting standards that focus on faithful and immediate reporting. An intelligence report should

¹² Al-Adahi’s brief misunderstands the government’s argument when it suggests that the government is asking for deference to “the assessments of anonymous military interrogators.” A-ABr. at 16. The government should receive deference for its expert declarations, see Br. 46, but the district courts should assess the intelligence collectors’ contemporaneous judgments together with all the other evidence.

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“[a]ccurately reflect the information obtained from the source” and “clearly identif[y]” any comments and conclusions made by the reporter, rather than the source himself. See generally Army Field Manual 2-22.3, 10-1. The intelligence collector should report “all information collected” and must not “filter information” before including it in a report. *Ibid.* Because intelligence collectors are directed to “[r]eport information as soon as operationally feasible,” *ibid.*, they write the reports shortly after hearing the witness’s statements, while the information is fresh in their minds.

The military intelligence materials admitted in the habeas proceeding have other familiar indicia of reliability. As discussed above, most of the out-of-court statements were made by Al-Adahi himself, and these statements would not be hearsay even if the evidence rules applied. See Fed. R. Evid. 801(d)(2). Further, in this proceeding, as in any other, a court should accept a party’s own statement as reliable because a litigant should not be permitted to disavow what he himself has said; “it does not lie in [a party’s] mouth to question the trustworthiness of his own declaration * * *.” Charles Alan Wright and Kenneth W. Graham, Jr., *FEDERAL PRACTICE & PROCEDURE*, Vol. 30, § 6332 n.31 (quoting McCormick, *Evidence*, 1954, p. 503). Many of Al-Adahi’s statements also were against his own personal interest, another indicator of reliability.

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Al-Adahi also objects to the intelligence reports on the basis that the government did not separately establish for each document that the translator acted as a “language conduit,” rather than as someone who might “mislead” Al-Adahi and “distort” his statements. A-ABr. at 45-46. But hearsay problems emerge when the translator is not acting merely as a translator but also as a law enforcement official. See, e.g., *United States v. Sánchez Godínez*, 444 F.3d 957, 960 (8th Cir. 2006) (translator was a law enforcement officer who also questioned the defendant). Al-Adahi does not allege that any specific document or statement was mistranslated, and the actual evidence belies his assertions that the translators were selective about what they translated. Many intelligence reports describe such minutiae as the ebb and flow of the conversation (see, e.g., J.A. 397 (“the conversation moved onto the sugar” the interrogator had brought); *id.* 398 (the interrogator “shifted gears and asked” a new line of questions)), ascribe statements specifically to the interrogator or to Al-Adahi, (see *ibid.*), and report Al-Adahi’s non-committal responses (see *ibid.* (Al-Adahi “didn’t really remember anymore about the Africans”))).

This Court should also reject Al-Adahi’s fundamentally unsound suggestion that the district courts should look at each item of evidence in a vacuum. See A-ABr. at 40-42. The trial court must test whether a report is reliable not from looking at the document alone, but by asking whether the report is corroborated by independent

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sources, and whether it makes sense within the context of the evidence as a whole. See generally *Parhat v. Gates*, 532 F.3d 834, 849-850 (D.C. Cir. 2008). As a practical matter, it would make no sense to require the district courts to examine each document independently in a preliminary pretrial inquiry, as Al-Adahi suggests. See A-A Br. at 40-42. Such a procedure would only burden the district courts with elaborate pretrial matters and prevent them from promptly resolving the almost two hundred habeas proceedings assigned exclusively to this Circuit.¹³

Most importantly, however, the district court habeas procedures give ample opportunity for counsel to make their points to the trial court about the unreliability of particular reports or other items when the evidence has been submitted to the court. That “ultimate safeguard,” *Beech Aircraft*, 488 U.S. at 168, allows the courts to evaluate reliability appropriately in this unique context. See also *Singletary v. Reilly*, 452 F.3d 868, 873 (D.C. Cir. 2006) (allowing the submission in a parole revocation hearing of a hearsay police report where “the parolee was given a chance to present contrary evidence at the hearing”).

¹³ This habeas proceeding, for example, was heard almost entirely on a paper record involving some 650 pages of documents. The appeal in *Bensayah v. Obama*, No. 08-5337 (D.C. Cir.) had a record of approximately 7,000 pages, while the record in *Al Bihani v. Obama*, No. 09-5051 (D.C. Cir.), is approximately 3,000 pages long.

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As Al-Adahi's brief points out (*e.g.* at 25), the district court in this case made adverse credibility determinations about hearsay evidence, and the government has not challenged those determinations. See J.A. 137. By admitting the hearsay evidence and testing it carefully for reliability, the district courts generally have struck a balance that allows the habeas proceedings to go forward, while providing meaningful judicial safeguards for the detainees. Undeniably here – where the government has produced to Al-Adahi's counsel the full factual basis for detaining Al-Adahi – the evidence is far more developed than the³ [REDACTED] declaration that the *Hamdi* plurality concluded could properly be admitted to test a military detention. *Hamdi*, 542 U.S. at 558. The district court therefore did not err when it rejected Al-Adahi's request for an outright ban on intelligence information.

B. The Geneva Conventions Do Not Entitle Al-Adahi To The Relief He Demands In This Habeas Corpus Proceeding

Al-Adahi contends that if this Court remands this case, “it should do so with instructions that evidence collected in violation of the Geneva Conventions should not be admitted or considered.” A-ABr. at 55. Al-Adahi claims that he and other detainees who have provided statements have been held “in conditions that violate the Geneva Conventions,” and that it was error for the district court to admit such statements. *Id.* at 55-56. In so arguing, Al-Adahi cites “Articles 17, 22 and 25 of the

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Third Geneva Convention,”¹⁴ which he asserts “prohibit the United States from interrogating civilian detainees with coercive techniques and holding them in prisons.” The Third Geneva Convention is a critical compact among the United States and its international partners, and complying with the Convention, as well as with other international obligations, is an important national priority for the United States.¹⁵ The argument asserted by Al-Adahi here, however, is without merit.

1. As an initial matter, the Convention provisions cited – Articles 17, 22 and 25 – do not even apply to Al-Adahi. By their plain terms, they apply only to “prisoners of war.”¹⁶ Al-Adahi is not a “prisoner of war” as that term is defined in

¹⁴ Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316 (“Third Geneva Convention”).

¹⁵ Notably, one of President Obama’s first acts in office was to issue an Executive Order intended “to ensure compliance with the treaty obligations of the United States, including the Geneva Conventions” in the treatment and interrogation of individuals held in detention by the Executive Branch. Executive Order 13491, 74 Fed. Reg. 4893 (January 22, 2009). Under the Executive Order, the treatment of individuals detained by the United States must be “consistent with the requirements of * * * Common Article 3” of the Geneva Conventions. *Ibid.* Under the terms of Executive Order 13491, accordingly, individuals in detention “shall in all circumstances be treated humanely and shall not be subjected to violence to life and person * * * nor to outrages upon personal dignity” at any time. 74 Fed. Reg. at 4894.

¹⁶ See Art. 17 (“Every prisoner of war” is required to give detaining forces only his name, rank and serial number); Art. 22 (“Prisoners of war may be interned” only on land); Art. 25 (“Prisoners of war shall be quartered” in treaty-compliant quarters).

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Article 4 for purposes of the Third Geneva Convention. See Geneva Convention Art. 4 (describing six specific categories of people who may be entitled to POW status). Indeed, the categories set out in Article 4 make clear that the POW status of an enemy fighter depends on his membership in a group that satisfies the Article 4 criteria. See Art. 4(A)(1)-(3); *United States v. Lindh*, 212 F. Supp. 2d 541, 558 n.39 (E.D. Va. 2002). Thus, even if the Convention provided individuals with judicially enforceable rights, Al-Adahi does not fall within any of those six categories and thus he still could not claim any rights under these provisions, which are limited to those with POW status.

Nothing Al-Adahi cites in his brief overcomes this fundamental flaw. He cites Common Article 3,¹⁷ see A-ABr. at 56, which does apply to the United States' conflict with al-Qaida in Afghanistan. See generally *Hamdan v. Rumsfeld*, 548 U.S. 557, 630-631 (2006) (explaining that Common Article 3 applies to the United States' conflict with al-Qaida in Afghanistan). Common Article 3, however, does not render Articles 17, 22 or 25 applicable to the conflict with al Qaeda. Rather, Common Article 3 applies to non-international armed conflicts, whereas the provisions of the Geneva Conventions that establish POW status apply only to international armed

¹⁷ It is known as "common" Article 3 because it occurs in each of the Geneva Conventions. It bars, *inter alia*, "cruel treatment and torture," and "humiliating and degrading treatment."

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conflicts. Nor does Al-Adahi even claim any specific violation of the terms of Common Article 3. In the district court, moreover, his counsel expressly disclaimed earlier claims of torture. See June 24, 2009 Transcript at 98 (“On the issue of torture, I have stopped raising that issue at this point”).

2. The Geneva Convention argument is fatally flawed in several other respects, as well.

a. Even if these Convention provisions applied, they would not be the basis for an evidentiary exclusionary rule. The single case cited by Al-Adahi recognized such a rule for *criminal* cases to evidence obtained in violation of the United States Constitution. See *Mapp v. Ohio*, 367 U.S. 643 (1961). This is not a criminal case and Al-Adahi has not alleged a violation of the United States Constitution as a ground for the exclusion of the government’s evidence. Moreover, even in the criminal context, the Supreme Court has made clear that a treaty violation is not generally remedied through an exclusionary rule. See *Sanchez Llamas v. Oregon*, 548 U.S. 331, 343-351 (2006) (evidence obtained in violation of the consular notification provisions of Article 36 the Vienna Convention was not subject to an exclusionary rule in a criminal trial). “[W]here a treaty does not provide a particular remedy, either expressly or implicitly, it is not for the federal courts to impose one on the States through lawmaking of their own.” *Id.* at 347. Here in particular, where the treaty

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creates no judicially enforceable rights for individuals, there is no plausible basis for creating a novel evidentiary exclusionary rule.

b. The Geneva Convention is not judicially enforceable in actions brought by individuals in the United States courts.¹⁸

While some treaties are properly construed to provide rights that are judicially enforceable by individuals, “[i]nternational agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts.” Restatement (Third) of Foreign Relations Law of United States § 907, Comment a (1986). In *Argentine Republic v. Amerasia Shipping Corp.*, 488 U.S. 428, 442 & n.10 (1989), for example, the Supreme Court held that treaty language specifying that a merchant ship “shall be compensated for any loss or damage” and that a “belligerent shall indemnify” damage it caused did not create a private right of action for compensation in a U.S. court.

In *Medellin v. Texas*, 128 S. Ct. 1346 (2008), the Supreme Court described the Restatement’s observation (quoted above) that treaties generally do not create private

¹⁸ Criminal statutes (18 U.S.C. § 2441 (criminalizing grave breaches of Common Article 3); 18 U.S.C. § 2340A (criminalizing torture); 10 U.S.C. § 893 (criminalizing cruelty and maltreatment)), Department of Defense regulations (DoDD 2310.01E, 2310.0 IE, E4.1.4), and diplomatic mechanisms (Convention Articles 8, 10, 11, 132;), as well as congressional and executive oversight, serve as checks to ensure continued compliance with the Geneva Conventions.

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rights or provide for a private cause of action in domestic courts as a "background presumption." *Id.* at 1357 n.3. Whatever the precise nature of such a presumption, however, it is not always necessary, in order for a particular treaty to be found to create privately enforceable rights, that the treaty expressly so provide. In certain circumstances, the intent to create such rights may be evidenced by the terms, structure, history, and subject of the treaty. But however that intent may be manifested, it is the private person seeking to enforce a treaty in court who must demonstrate that the treaty creates in him an individually enforceable right.

Al-Adahi has not even attempted to satisfy that burden and, as we explain below, that burden cannot be met in regard to the Geneva Convention.

Any examination of whether the Convention provides individuals with judicially enforceable rights must begin with the fact that the Supreme Court held that the 1929 Geneva Convention did *not* provide such rights. In *Johnson v. Eisentrager*, 339 U.S. 763 (1950), the Court expressly concluded that German prisoners of war challenging the jurisdiction of a military tribunal "could not" invoke the 1929 Third Geneva Convention because the protections afforded under it were not judicially enforceable by the captured party. *Id.* at 789. Rather, the Court held, those protections "are vindicated under it only through protests and intervention of protecting powers." *Id.* at 789 n.14. Although the Supreme Court has deemed

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Eisentrager's footnote "curious," *Hamdan*, 548 U.S. at 627, the Court in *Hamdan* did not repudiate *Eisentrager*'s statement that the Conventions cannot be judicially enforced by individuals.

This Court, too, has recognized that the 1929 version of the Third Geneva Convention did not provide individuals with judicially enforceable rights. In *Holmes v. Laird*, 459 F.2d 1211, 1221-22 (D.C. Cir.), *cert. denied*, 409 U.S. 869 (1972), the Court explained that "the obvious scheme of the Agreement [is] that responsibility for observance and enforcement of these rights is upon political and military authorities, and that rights of alien enemies are vindicated under it only through protests and intervention of protecting powers * * *." *Id.* at 1222 (footnotes and quotations omitted).

When the Senate granted its advice and consent for the current version of the Convention (in 1955), there was no indication that it disagreed with *Eisentrager* (which was decided only five years earlier) or that it sought to change the essential character of the treaty to permit alleged treaty violations to be enforced by captured enemy forces through the captor's judicial system. To the contrary, the plain terms of the revised Convention show that, as with the 1929 version, vindication of the treaty is a matter of State-to-State diplomatic relations, not domestic court resolution.

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Article 1 of the treaty explains that the parties to the Convention “undertake to respect and to ensure respect for the present Convention in all circumstances.” This provision clarified that it was the duty of all parties not only to adhere to the Convention, but also to ensure compliance by every other party to the Convention. *See* 59 INTERNATIONAL LAW STUDIES: PRISONERS OF WAR IN INTERNATIONAL ARMED CONFLICT, 26-27 (Naval War College Press 1978). Establishing a peer-nation duty to ensure enforcement was deemed at the time to be a critical advancement in securing compliance with the treaty. *Ibid.*

Further to effectuate compliance, the 1949 Convention relied upon third-party — “protecting powers”¹⁹ — oversight. Article 8 provides that the treaty is to be “applied with the cooperation and under the scrutiny of the Protecting Powers * * *.” Art. 8. Reliance upon “protecting powers” was also a prime feature of the 1929 Convention. *See* 1929 Convention Art. 86. Article 11 of the 1949 revision of the Convention, however, clarified and increased the role of the protecting powers in cases where there is a disagreement about the application or interpretation of the Treaty: “in cases of disagreement between the Parties to the conflict as to the application or interpretation of the provisions of the present Convention, the

¹⁹ The role of the “protecting power,” in modern time, has been performed by the International Committee of the Red Cross.

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Protecting Powers shall lend their good offices with a view to settling the disagreement.” Art. 11. Thus, Article 11 sets out one of the primary “methods for resolving” disputes relating to application and interpretation of the Convention. *See* 59 INTERNATIONAL LAW STUDIES at 87.

The “second method for resolving disputes” described in the 1949 Convention is the “‘enquiry’ provided for in Article 132.” 59 INTERNATIONAL LAW STUDIES at 88. Article 132 provides that at “the request of a Party to the conflict, an enquiry shall be instituted, in a manner to be decided between the interested Parties, concerning any alleged violation of the Convention.” Art. 132. It further states that if “agreement has not been reached concerning the procedure for the enquiry, the Parties should agree on the choice of an umpire who will decide upon the procedure to be followed.” *Ibid.* This Article was deemed an improvement over the 1929 Convention, which did not provide for the use of an “umpire” to settle disputes. *See* 1929 Convention, Art. 30.

The Convention thus creates specific measures to ensure enforcement, none of which remotely contemplated a legal action brought by the captured party in the courts of the detaining nation to enforce the treaty.

Thus, it is no accident that in *Hamdan v. Rumsfeld*, 415 F.3d 33, 39 (D.C. Cir. 2005), *rev’d on other grounds*, 548 U.S. 557, 627 (2006), this Court held that the

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Third Geneva Convention “cannot be judicially enforced,” but must be enforced instead through the diplomatic mechanisms described in the treaty. *Hamdan*, 415 F.3d at 39. If this Court were “to require suppression for [Geneva Convention] violations without some authority in the Convention,” however, it “would in effect be supplementing those terms by enlarging the obligations of the United States under the Convention.” *Sanchez Llamas*, 548 U.S. at 346. And as the Supreme Court in *Sanchez Llamas* recognized, “[t]his is entirely inconsistent with the judicial function.” *Ibid*.

3. Even if there was some question of whether the Convention was intended to provide Al-Adahi judicially enforceable rights, or whether Congress intended to permit such enforcement through the habeas statute²⁰ or the AUMF, Congress has resolved all such doubts. In the Military Commissions Act, Congress explicitly barred the invocation of the Geneva Conventions as a source of privately enforceable rights in habeas proceedings: “No person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus * * * proceeding” against the federal government “as a source of rights in any court of the United States or its States or

²⁰ We note that neither 28 U.S.C. § 1331 nor the habeas statute transforms a treaty that does not grant judicially enforceable rights into one subject to judicial enforcement at the behest of captured enemy forces. *See Wesson v. U.S. Penitentiary Beaumont*, 305 F.3d 343, 348 (5th Cir. 2002); *see also Wang v. Ashcroft*, 320 F.3d 130, 140 (2d Cir. 2003); *Bannerman v. Snyder*, 325 F.3d 722, 724 (6th Cir. 2003).

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territories.” 28 U.S.C. § 2241 (Note) (“MCA § 5”).²¹ This statute resolves any potential ambiguity and overrides any potential reading of the Convention to the contrary. See *Breard v. Greene*, 523 U.S. 371, 376 (1998) (per curiam); *United States v. Dion*, 476 U.S. 734, 738 (1986). In MCA § 5, “Congress has superseded whatever domestic effect the Geneva Conventions may have had” in a habeas corpus proceeding. *Noriega v. Pastrana*, 564 F.3d 1290, 1296 (11th Cir. 2009).

Al-Adahi is mistaken in arguing that the Supreme Court’s decision in *Boumediene* invalidated Section 5 of the MCA. See A-ABr. at 57. Rather, as the Eleventh Circuit has recognized, the questions *Boumediene* addressed “concerning the constitutionality of § 7 of the MCA, are not presented by § 5 * * *.” *Noriega*, 564 F. 3d at 1294.²²

²¹ This provision was enacted as Section 5 of the Military Commissions Act, Pub. L. 109-366, § 5, 120 Stat. 2631 (Oct. 17, 2006).

²² In district court, Al-Adahi claimed that Section 5 was unconstitutional under *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871). He has not reasserted that argument here, and it is therefore waived. In any event, it is without merit. The Article III principle of *Klein* “does not take hold when Congress ‘amend[s] applicable law,’” *Miller v. French*, 530 U.S. 327, 349 (2000) (citation omitted). Section 5 simply clarifies, as a matter of substantive law, that the Geneva Conventions are not judicially enforceable in actions brought by individuals in the United States courts. See *Robertson v. Seattle Audubon Soc’y*, 503 U.S. 429, 438 (1992) (rejecting an argument based on *Klein* and upholding Congress’s authority to amend substantive law when Congress did not “direct any particular findings of fact or applications of law, old or new”). That substantive amendment to the governing law is a valid (continued...)

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C. Al-Adahi Is Mistaken In Arguing That He Was Entitled To The Rights Accorded To Criminal Defendants

Al-Adahi argues that the district court should have excluded from the evidence the statements he made after his habeas counsel had filed a petition on his behalf in February, 2005. A-ABr. at 59. Al-Adahi relies upon a 1973 decision from an Illinois district court, excluding evidence on the basis of a *Miranda* violation in a criminal case. See A-ABr. at 59 (quoting and citing *United States v. Hedgeman*, 368 F. Supp. 585, 589 (N.D. Ill. 1973)). But *Miranda* is a constitutionally-based decision that in *criminal* cases protects the core constitutional right protected by the Self-Incrimination Clause of the Fifth Amendment. See generally *Dickerson v. United States*, 530 U.S. 428, 438 (2000). *Miranda* does not apply to Al-Adahi's habeas proceeding.

Al-Adahi also suggests – without developing the argument – that he had a constitutional right to “[c]onfront [h]is [a]ccusers” during his habeas proceeding. A-ABr. at 48. Any such right would derive from the Sixth Amendment, which provides that in “all criminal prosecutions, the accused shall enjoy the right * * * to be

²²(...continued)
exercise of Congress's legislative authority. See *Noriega*, 564 F.3d at 1295-96 (“it is within Congress' power to change domestic law, even if the law originally arose from a self-executing treaty.”).

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confronted with the witnesses against him * * *.” U.S. Const. amend VI. By its plain terms, the Sixth Amendment is limited to “criminal prosecutions.” See U.S. Const. amend. VI. And as the district court correctly noted in rejecting Al-Adahi’s Sixth Amendment argument (J.A. 129 n.14), even in the criminal context the Sixth Amendment generally does not apply in proceedings other than the defendant’s criminal trial. See, e.g., *United States v. Hayman*, 342 U.S. 205, 222-23 (1952) (Sixth Amendment does not apply to collateral habeas challenge to criminal conviction); *Ash v. Reilly*, 431 F.3d 826, 829-830 (D.C. Cir. 2005) (parole revocation hearings).²³

D. [REDACTED]

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[REDACTED]

²³ Although in the district court Al-Adahi also argued that ethical rules for lawyers were violated when Al-Adahi was questioned without his lawyers present, see J.A. 129 n.14, he has abandoned that argument in this Court.

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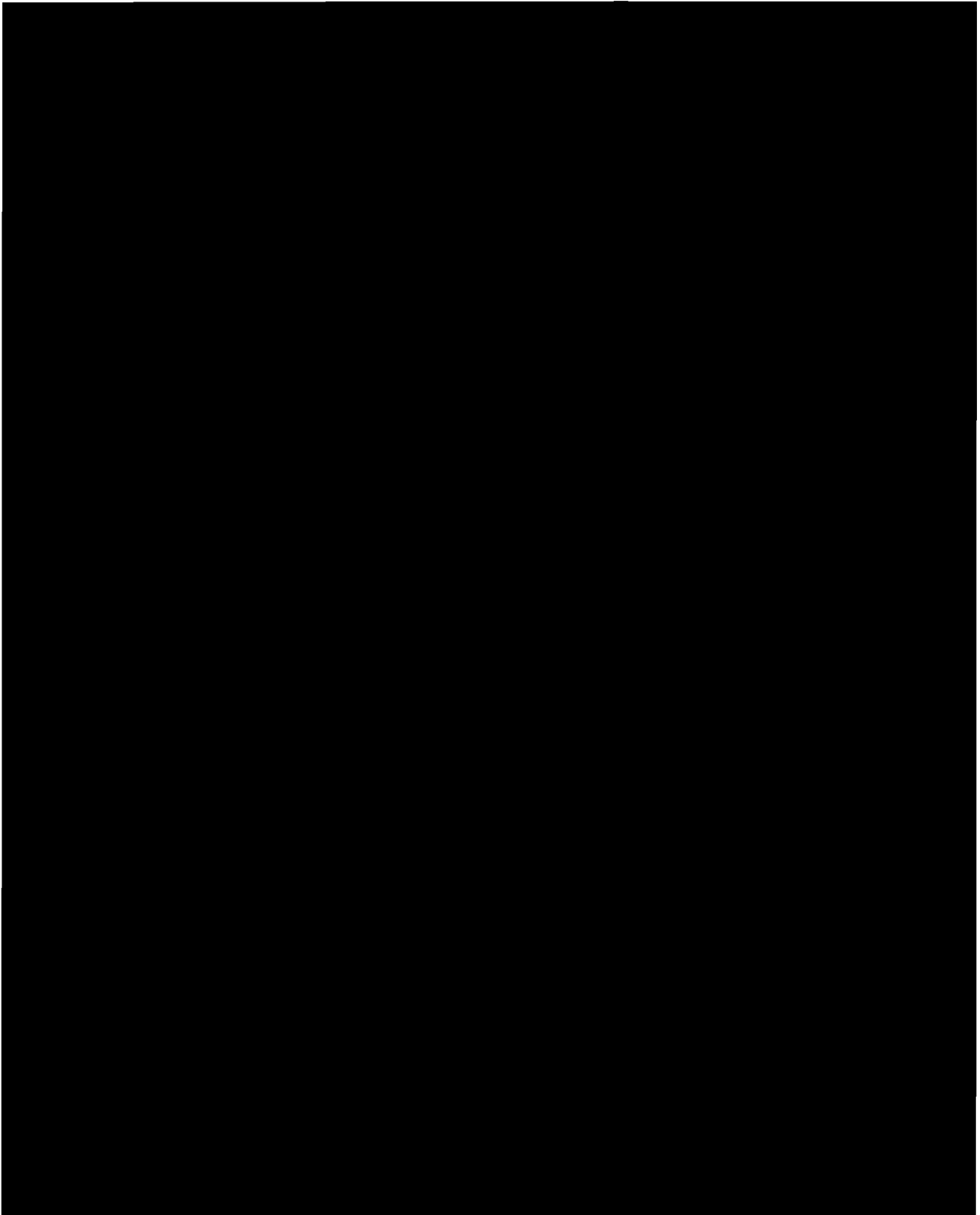
[REDACTED] Al-Adahi's counsel did not request a discovery deadline, and Judge Kessler did not impose one. Government counsel accordingly performed the search required by the discovery order, collected the potentially responsive documents, submitted them to the agencies for clearance, and produced the documents three weeks before the merits hearing. Al-Adahi's counsel did not request a continuance of briefing or of the hearing in light of the document's production.

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III. THE DISTRICT COURT PROPERLY TOOK ACCOUNT OF RELEVANT LEGISLATION AND FOREIGN POLICY CONCERNS WHEN IT ENTERED ITS RELEASE ORDER

Al-Adahi argues (at 50-55), that the district court's order granting the writ, which directed the government to "take all necessary and appropriate diplomatic steps" towards Al-Adahi's release and to report to Congress if necessary, J.A. 150, improperly "implies that" the government can detain Al-Adahi indefinitely. Al-Adahi's argument that his detention is "indefinite" also asserts that the district court should have released him pending appeal. See A-ABr. at 51.

Al-Adahi is mistaken in assuming that his detention is indefinite, or likely to be indefinite unless this Court directs the district court to release him without notification to Congress and without any diplomatic process. Al-Adahi has not yet been released from detention to date because the government has sought a stay pending appeal of the district court's release order, Dckt. No. 466, and the court has not yet acted on that order. Although Al-Adahi's brief argues (at 53-55) that no stay should be granted, this Court should not rule on the stay issues before the district court has acted.

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Ahmed v. Obama, (cited at A-ABr. at 53), is a case in which a detainee was released to Yemen after the government decided not to appeal the grant of the writ in his proceeding. In that case, Judge Kessler ordered Ahmed released under similar terms to those she imposed here for Al-Adahi. *Ahmed v. Obama*, 613 F. Supp. 2d 51, 66 (D.D.C. 2009). The government released Ahmed to Yemen in compliance with the district court's order. Indeed, *every* detainee under a court order of release – apart from one of the Uighurs, for whom extenuating circumstances make him difficult to place – has been offered a country where he could relocate, unless the government has appealed the release order. In this case, too, there is no reason to suppose that the district court's order would not be promptly followed if the habeas proceedings were to terminate in an order of release. Al-Adahi's brief accordingly fails to show that this Court should bar the district courts from issuing release orders that require compliance with relevant legislation and properly take into account the United States' need to engage in diplomatic discussions before release can be effectuated..

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CONCLUSION

For the forgoing reasons and for the reasons given in the government's opening brief, this Court should either vacate the judgment of the district court and remand the case for further proceedings, or reverse the judgment and direct the district court to enter an order denying the writ of habeas corpus.

Respectfully submitted,

TONY WEST
Assistant Attorney General

DOUGLAS N. LETTER
ROBERT M. LOEB
ANNE MURPHY
(202) 514-3588
*Attorneys, Appellate Staff
Civil Division, Room 7644
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530 0001*

NOVEMBER 2009

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**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(c)
OF THE FEDERAL RULES OF APPELLATE PROCEDURE**

I hereby certify, pursuant to Fed. R. App. P. 32(a)(7)(c) and D.C. Circuit Rule 32(a), that the foregoing brief is proportionally spaced, has a typeface of 14 points and contains 13,693 words.

Anne Murphy

STATEMENT OF ADDITIONAL RELATED CASES

In re Sealed Case, D.C. Cir. Nos. 09-5275, 09-5276, also involves an argument under the Geneva Conventions raised by military detainees at Guantanamo Bay. Briefing is currently scheduled to be completed on December 24, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that I have, this 25th day of November, 2009, filed and served the foregoing **Cross-Appellee and Reply Brief of Appellants** by delivering an original and fourteen copies for the Court, and two paper copies for counsel of record listed below, to the Court Security Officer:

JOHN A. CHANDLER
King & Spalding LLP
1180 Peachtree St, N.E.
Atlanta, GA 30309-3521

PATRICIA L. MAHER
King & Spalding LLP
1700 Pennsylvania Ave NW, Suite 200
Washington, D.C. 20006

RICHARD G. MURPHY, Jr.
Sutherland Asbill & Brennan LLP
1275 Pennsylvania Ave., N.W.
Washington DC 20004-2415

Anne Murphy
Attorney

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